STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK CONWAY,

Defendant-Appellant.

UNPUBLISHED
February 11, 2003

No. 237763
Saginaw Circuit Court
LC No. 01-019930-FC

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSI I), person under thirteen, MCL 750.520b(1)(a), and assault with intent to commit CSC involving sexual penetration, MCL 750.520g(1). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 240 to 480 months' imprisonment for CSC I and 108 to 240 months for assault. Defendant appeals as of right. We affirm in part, reverse in part, and remand.

Defendant first challenges the sufficiency of the evidence sustaining both convictions. Specifically, defendant argues that testimony from the victim that defendant touched the victim's penis with his tongue was insufficient to support a finding of penetration under the rule set in *People v Bruce Johnson*, 432 Mich 931; 442 NW2d 625 (1989) (*Bruce Johnson II*), adopting Judge Kelly's dissent in *People v Bruce Johnson*, 164 Mich App 634, 646-649; 418 NW2d 117 (1987) (*Bruce Johnson I*). We agree.

In a criminal case, due process requires that the prosecution introduce sufficient evidence that would justify a rational factfinder in finding guilt beyond a reasonable doubt. *People v Jermell Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Fisher*, 193 Mich App 284, 287; 483 NW2d 452 (1992). When considering whether sufficient evidence was presented to sustain a conviction, the reviewing court must consider the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All evidentiary conflicts are resolved in the prosecution's favor. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001).

Defendant was charged with CSC I – person under thirteen. MCL 750.520b(1)(a). Sexual penetration is an essential element of any charge of CSC I. MCL 750.520b(1). Sexual penetration is defined under the chapter as including "sexual intercourse, cunnilingus, fellatio, anal intercourse or any other intrusion, however slight, of any part of any person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(m). It is not disputed that the victim was under thirteen years old, thus our inquiry focuses on whether there was "penetration however slight."

Judge Kelly's dissent in *Bruce Johnson I, supra* 164 Mich App 647, noted that the defendant in that case was charged with sexual penetration, fellatio, and evidence that defendant "kissed" the victim's penis established contact but not penetration. Judge Kelly noted the distinction between fellatio and cunnilingus. Fellatio was defined as "the act of taking the penis into the mouth" and "to suck or oral stimulation of the penis." *Bruce Johnson I, supra* at 647, quoting *People v Harris*, 158 Mich App 463, 469; 404 NW2d 779 (1987). Judge Kelly specifically excluded the *People v Sommerville*, 100 Mich App 470, 480; 299 NW2d 387 (1980), definition of cunnilingus from his analysis, noting that any oral contact with female genitals was sufficient for cunnilingus by definition, and the same is not true of fellatio. *Johnson I, supra* at 649 n 1. Judge Kelly also noted that "kiss" was defined as "to caress with the lips" and opinioned that "it was an exercise in casuistry to equate contact with penetration or intrusion." *Johnson I, supra* at 648. Essentially, mere contact through a kiss on the penis does not establish fellatio or penetration, "however slight." See MCL 750.520a(m).

In the instant case, the victim's testimony was that defendant's tongue touched the victim's penis. The touch was characterized as a "lick" in the argument, without evidence of stimulation. The Random House Webster's Collegiate Dictionary (1997) defines "lick" as "to pass the tongue over the surface of, as to moisten, taste or eat" or "to make or cause to become, by stroking with the tongue." This language does not suggest penetration, however slight, and without more is insufficient to establish the requisite element of penetration. Taken in context, the testimony that defendant "touched with his tongue" or "licked" the victim's arms, chest, and penis suggest only contact and not penetration. *Johnson I, supra* at 648. We are compelled to so find by virtue of *Johnson II*. However, we do not agree that this finding is necessarily an "exercise in casuistry" as Judge Kelly opined. See *Johnson I, supra* at 648. The statute defines sexual penetration as fellatio, and the definition of fellatio includes the language, "to suck or oral stimulation of the penis." We read this language, including the disjunctive "or," to indicate that the statute does not necessarily require taking the penis into the mouth.

In any event, as we are compelled to find error, the error was compounded by the trial court's use of CJI2d 20.1(c), used to describe cunnilingus instead of that used in circumstances suggesting penetration, CJI2d 20.1(b). On the record presented, it is not "clear beyond a reasonable doubt" whether a rational jury would have found defendant guilty absent the error. *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001). An error of the trial court is not grounds for granting a new trial unless refusal to do so appears to the court inconsistent with substantial justice, which involves a showing of prejudice. MCR 2.613(A); *People v Mateo*, 453 Mich 203, 212-215; 551 NW2d 891 (1996). We find reversal is warranted because defendant's conviction is based on an incorrect definition of an element of the charged offense, and is properly described as seriously affecting the fairness, integrity, and public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Notwithstanding, we find defendant's associated sufficiency challenge regarding his assault conviction without merit. To support a conviction for assault with intent to commit CSC involving sexual penetration, the prosecution was required to prove an assault with the specific intent to commit sexual penetration. *People v Love*, 91 Mich App 495, 502; 283 NW2d 781 (1979). Proof of intent to commit criminal sexual conduct was necessarily established by proof of former elements. *Id.* An assault has also been defined as "'any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate injury to a human being.' 2 Bishop Criminal Law § 23 (7th ed)." *People v Worrell*, 417 Mich 617, 622; 340 NW2d 612 (1983), quoting *People v Carlson*, 160 Mich 426, 429; 125 NW 3612 (1910).

Again, questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Intent may be inferred from all the facts and circumstances. *People v Harris*, 110 Mich App 636, 641; 313 NW2d 354 (1981). In *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997), this Court considered evidence that the defendant touched the genitalia of the complainant, choked her, and ordered her to take off her pants. When combined with the defendant's fumbling with his pants, this was sufficient to support the reasonable conclusion that defendant intended to penetrate the complainant. *Id*. Similarly testimony that defendant threatened the victim with a "whooping" and "the belt" to overcome his resistance to the criminal sexual conduct and overcome his reluctance to climb atop the naked defendant, and then telling him to "do what them people do when they get married" – understood to mean sexual intercourse – was sufficient to allow a reasonable jury to find that defendant was guilty of assault with intent to commit CSC involving penetration. *Johnson, supra,* 460 Mich 723; *McFall, supra* at 412. When all evidentiary conflicts are resolved in favor of the prosecution, we find sufficient evidence to support defendant's conviction of the assault charges. *Johnson, supra,* 460 Mich 723; *Harmon, supra,* 248 Mich App 524.

Last, defendant challenges the scoring of his guidelines. This issue is not preserved because defendant failed to object to scoring before or during sentencing. MCR 6.429(C); MCL 769.34(10); *Harmon*, *supra*, 248 Mich App 530; *People v Cain* 238 Mich App 95, 129-130 (1999). Defendant correctly points out that a recent decision of a panel of this Court allows review for plain error affecting substantial rights. *People v Kimble*, 252 Mich App 269, 276 n 5; 651 NW2d 798 (2002). '"It is well settled that mere forfeiture . . . does not extinguish error.'" *Id.* at 275, quoting *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Consequently, our review of defendant's guidelines scoring reveals numerous scoring errors of both prior record variables and offense variables. In addition to other errors, defendant was erroneously scored twenty-five points for OV 11, resulting in his being sentenced outside the appropriate guidelines recommendation. In our view, correction of the unscored offense variables does not render the error harmless. Accordingly, defendant's remaining conviction for assault is remanded for resentencing.

Affirmed in part, reversed in part, and remanded to the trial court for actions consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio